

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

QUINCY CULPEPPER,

Petitioner,

v.

SCOTT KERNAN, Warden,

Respondent.

Case Number C 04-1050 JF

ORDER¹ DENYING PETITION FOR
WRIT OF HABEAS CORPUS

I. BACKGROUND

Petitioner Culpepper (“Culpepper”) and co-defendants Mark Upshaw, Anthony Wright, and Rolls Royce Miller each were charged with felony assault with a firearm (§ 245, subd. (a)(2)), with a sentence enhancement for personal use of a firearm (§ 12022.5). Culpepper also was charged with being a felon in possession of a firearm (§ 12021, subd.(a)). The charges against Culpepper were based on his participation in an assault, which his co-defendants had initiated and he had joined, during which Culpepper struck the victim with a gun belonging to one of his co-defendants.

¹ This disposition is not designated for publication and may not be cited.

1 The handwritten Declaration in Support of Arrest, dated February 28, 2001, charged
2 violations of “245(a)CDPC” and “12021PC.” The Amended Complaint, based on this
3 declaration, charged all three defendants with “a violation of Section 245(a)(2) of the Penal Code
4 of California” and “USE OF FIREARM CLAUSE (Penal Code Section 12022.5(a)) PER ALL
5 DEFENDANTS [complaint’s emphasis]” as the First Count. The Complaint’s Fourth Count
6 charged Culpepper with violating Section 12021(a). These charges were identified in the
7 “Clerk’s Docket and Minutes” (“CDM”) as “COUNTS 1)F245(A(2)USE PC . . . 4)F12021(A) PC
8 1 PR.” CDMs dated 3/01/01, 3/02/01, 3/07/01, 3/29/01, 4/06/01, 4/20/01, and 6/21/01.

9 After initially pleading not guilty to all charges, Culpepper, represented by attorney
10 Charles Jamison (“Jamison”), entered into a plea agreement with the District Attorney on June
11 21, 2001. Prior to the court proceeding in which Culpepper formally entered his plea, the terms
12 of the plea bargain were memorialized in a “Waiver on Plea of Guilty/No Contest” (“Waiver on
13 Plea”) form, which Culpepper signed, and which he also initialed as to each right waived. On
14 this form, Culpepper asserted that he understood his “absolute” rights under the U.S.
15 Constitution, including the right to “a speedy and public trial by jury,” and was waiving them “in
16 order to enter [his] guilty/no contest plea(s).” Culpepper acknowledged, on this form, that he
17 understood he was charged with “P.C. 245(a)(2) / P.C. 12021(a)” and was pleading no contest to
18 “”P.C. 245(a)(2).” Jamison countersigned this form in his capacity as Culpepper’s attorney.

19 Later that day, a formal “Change of Plea” proceeding was held, at which Culpepper and
20 Jamison both were present. At this proceeding, in the presence of both Culpepper and Jamison,
21 the trial judge specifically asked the prosecutor whether the 245(A)(2) no contest plea was “with
22 or without the use clause,” to which the prosecutor responded that the offer was “245(a)(2) plus
23 the use clause with no promises.” Reporter’s Transcript (“RT”), p. 1, lines. 9-15. Culpepper’s
24 attorney made no objection to this assertion by the prosecutor.

25 The trial judge then ordered Culpepper to set up an interview with an assigned probation
26 officer, to return to court for sentencing, and to “stay out of trouble, no new crimes.” The judge
27 promised that, “[i]f you live up to those three conditions, my promise holds no prison,” and
28 warned that, “if you fail to live up to any one of those conditions, then all deals are off. Then

1 you're stuck with your plea and technically then you could end up going to prison for up to 14
2 years." *Id.*, lines 10-28.

3 The trial judge then asked Culpepper, "Do you understand that?" Culpepper responded,
4 "Yes." The judge again admonished Culpepper that should he violate any of the three
5 conditions, probation could be revoked. The trial judge enumerated the potential consequences
6 of such a revocation of probation, warning Culpepper that, "if you went to prison it could be two
7 years, three years or four years on the assault charge. Plus an additional three years, four years or
8 ten years for use of a firearm. So a maximum, an absolute maximum of 14 years." The judge
9 again asked Culpepper, " "Do you understand that?" and again Culpepper answered, "Yes." *Id.*
10 at 4, lines 1-13. Neither Jamison nor Culpepper objected to, questioned, or otherwise disputed
11 the trial judge's calculations as to the potential sentence that could be imposed, should Culpepper
12 violate the conditions of probation.

13 The trial judge then told Culpepper that, by entering a no contest plea, Culpepper would
14 be "giving up some important legal rights" including "a right to a speedy public jury trial." The
15 Court asked Culpepper whether he understood that right, to which Culpepper again answered,
16 "Yes." *Id.* at 5, lines 22-28. The Court enumerated the other rights Culpepper was waiving, as
17 listed on the Waiver on Plea form, including "to confront the witnesses against you" and "to
18 remain silent." Culpepper stated that he understood each of these rights, and waived all of them
19 of his own free will. *Id.* at 6, lines 1-21. The Court then asked Culpepper for his plea as to "a
20 violation of Section 245 subdivision (a) (2) of the Penal Code, Assault with a Firearm," and
21 Culpepper answered, "No contest." *Id.* at 7, lines 11-17. The Court then asked, "To the
22 allegation that in and during the commission of that offense and attempted commission you
23 personally used a firearm, do you also plead no contest?" Culpepper answered, "Yes." *Id.* at 7,
24 lines 18-21.

25 Subsequent CDMs, including on 9/24/01, 9/27/01, 9/28/01, 10/04/01, 11/16/01, 11/26/01,
26 12/03/01, enumerate the charges, "1)F245A)2)USE PC CONVICTED-NOLO C" and
27 "4)F12021(A) PC 1 PR DISM-VIEW OF." The CDMs dated 09/04/01 and 10/25/01,
28 respectively, also documented that Culpepper was seeking to retain new counsel, and then that he

1 had retained attorney Walter Pyle (“Pyle”) to represent him.²

2 On November 2, 2001, Culpepper, represented by Pyle, moved to withdraw his no contest
3 plea to the Section 12022.5 violation on the grounds that “as to that charge (personal use of a
4 firearm), he was not advised of, nor did he give up his constitutional right to a jury trial, . . . to
5 confront and cross-examine witnesses, and . . . not to incriminate himself.” Therefore, Culpepper
6 asserted, his plea to the Section 12022.5 charge “was not understandingly and voluntarily made.”
7 Motion brief, p. 1.

8 Culpepper acknowledged that he had pled no contest to violating both Sections 245(a)(2)
9 and 12022.5, and did not dispute that the former plea was voluntarily made, with knowledge of
10 all of the constitutional rights he was waiving. He asserted, however, that the record lacked any
11 advisements of “constitutional rights as to the section 12022.5 charge, or any waiver of those
12 rights,” but merely “reflect[ed] an admission of the charge.” *Id.*, p. 2. Culpepper cited case law
13 interpreting both the federal Constitution generally and California state law with specific
14 reference to Section 12022.5, recognizing a defendant’s rights to a jury trial, to confront and
15 cross-examine witnesses, and against self-incrimination, on an enhancement violation. *Id.*

16 Culpepper noted that “[t]he penalty for Culpepper’s underlying offense of Penal Code
17 section 245(a)(2), as a felony, is two, three, or four years. Penal Code section 12022.5 is
18 punishable by an additional and consecutive three, four, or ten years.” *Id.*, p. 3. He then quoted
19 selected portions of the trial transcript which, taken alone, could be construed in a way that
20 would support his contention that, in fact, he was not advised of his rights as to Section 12022.5
21 and did not waive those rights. *Id.*, p. 5. Culpepper, however, omitted from his motion brief the
22 trial court’s explicit warnings that, should he violate the court’s conditions, he could be
23 imprisoned for two-to-four years “on the assault charge. Plus an additional three years, four
24

25 ²Pyle represented Culpepper in his Motion to Withdraw Plea, and filed the Application
26 for Certificate of Probable Cause to appeal the trial court’s denial of that motion. Subsequently,
27 Culpepper acted *pro se* and then was represented by Attorney Kyle Gee on appeal. After the
28 California Supreme Court denied his petition for review, Culpepper filed the instant petition for
writ of habeas corpus in this court *pro se*, and then again retained Pyle, who currently represents
him.

1 years or ten years for use of a firearm. So a maximum, an absolute maximum of 14 years.”

2 On December 3, 2001, Culpepper’s motion was denied, imposition of sentence was
3 suspended, and he was placed on probation with conditions including nine months in County
4 Jail.

5 On January 14, 2002, Culpepper filed a Notice of Appeal and Application for Certificate
6 of Probable Cause, which Certificate was issued on February 2, 2002. He asserted that, under the
7 rule of *Boykin v. Alabama* 395 U.S. 238 (1969) and related cases, the trial court record failed to
8 show affirmatively advisement as to his federal constitutional rights for the Section 12022.5
9 offense, and that his plea therefore was invalid.

10 On March 28, 2003, the state appellate court affirmed the trial court’s denial of
11 Culpepper’s motion to withdraw his plea to the Section 12022.5 offense, finding that, “[i]n the
12 totality of the circumstances, Culpepper’s plea to the enhancement was voluntary and
13 intelligent.” App. Dec., p. 6. The court noted that the trial transcript documented that “the
14 prosecutor and court each described the count one as including both the assault charge *and* the
15 enhancement.” *Id.* (court’s emphasis). The court detailed why each of the cases cited by
16 Culpepper were distinguishable from his case and therefore inapplicable. *Id.*

17 In his petition for review filed with the California Supreme Court on April 29, 2003,
18 Culpepper asserted that, because the Waiver of Rights form that he had signed and initialed did
19 not include the Penal Code numerical identifier “12022.5,” he did not waive his rights as to this
20 particular charge. Petition for Review, p. 7-8. Culpepper acknowledged, quoting from the
21 transcript, the trial court’s admonition to him that “a subsequent violation of probation could
22 result in a State Prison commitment of ‘two years, three years or four years on the assault charge.
23 Plus an additional three years, four years or ten years for use of a firearm.’” *Id.*, p. 8. Culpepper
24 then directly quoted the trial transcript, in which he entered two separate pleas of no contest, first
25 that he “committed a felony, a violation of section 245 subdivision (a) (2) of the Penal code,
26 assault with a firearm,” and then “to the allegation that in and during the commission of that
27 offense and attempted commission you personally used a firearm.” *Id.*, p. 9.

28 The gist of Culpepper’s argument to the California Supreme Court was that the trial

1 court's use of the language "plus the use clause" and "with the use of a firearm clause," rather
 2 than the numerical identifier "Penal Code Section 12022.5," in specifying the enhancement
 3 charge, constituted a failure to advise him of his rights as to that charge, thereby invalidating his
 4 no contest plea to it. In particular, Culpepper argued that after apprising him of all the rights he
 5 was waiving, the trial court asked him whether he "also" was pleading no contest to the charge of
 6 "having personally used a firearm in and during the commission of [the Section 245(a)(2)
 7 offense]," rather than asking whether he was "also" pleading no contest to "Penal Code Section
 8 12022.5." Based on this reasoning, Culpepper asserted that the trial court apprised him of his
 9 rights only as to the Section 245(a)(2), and not as to the Section 12022.5 offense.

10 Culpepper acknowledged that during the trial court proceeding he "was represented by
 11 Counsel and advised of the three rights as to the underlying charge." *Id.*, p. 15. The foundation
 12 of his claim is based on his assertion that "he was not advised of – and did not waive – his right
 13 to have a jury decide the firearm use allegation if it found him guilty of one or more counts . . .
 14 [and he] was not advised of his right to confront adverse witnesses on this allegation." *Id.*

15 After the California Supreme Court issued a summary denial, Culpepper filed a timely,
 16 exhausted habeas corpus petition in this Court on March 16, 2004. The instant petition alleges a
 17 single claim, that his plea of no contest as to the Section 12022.5 violation was not knowing and
 18 voluntary. The matter having been fully briefed and all of the parties' arguments having been
 19 considered, the Court concludes that the petition is without merit and therefore should be
 20 denied.³

21 II. STANDARD OF REVIEW

22 This Court will entertain a petition for writ of habeas corpus on "behalf of a person in
 23 custody pursuant to the judgment of a State Court only on the ground that he is in custody in
 24 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).
 25 The petition may not be granted with respect to any claim that was adjudicated on the merits in
 26

27 ³ The matter was taken under submission without oral argument upon completion of the
 28 briefing pursuant to Civ. L. R. 7-1(b).

1 state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was
2 contrary to, or involved an unreasonable application of, clearly established Federal law, as
3 determined by the Supreme Court of the United States; or (2) resulted in a decision that was
4 based on an unreasonable determination of the facts in light of the evidence presented in the state
5 court proceeding." 28 U.S.C. § 2254(d).

6 A state court's decision is "contrary to" clearly established federal law if the state court
7 arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if
8 the state court reaches a decision different from that reached by the Supreme Court on a set of
9 materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state court's
10 decision involves an "unreasonable application" of clearly established federal law if the state
11 court identifies the correct governing legal principle but unreasonably applies that principle to the
12 facts of the petitioner's case. *Id.* "[A] federal habeas court may not issue the writ simply
13 because the court concludes in its independent judgment that the relevant state-court decision
14 applied clearly established federal law erroneously or incorrectly. Rather, that application must
15 also be unreasonable." *Id.* at 411.

16 A state court's decision is based upon "an unreasonable determination of the facts in light
17 of the evidence presented" when the state court fails to consider and weigh highly probative,
18 relevant evidence, central to the petitioner's claim, that was properly presented and made part of
19 the state-court record. *Taylor v. Maddox*, 366 F.3d 992, 1005 (9th Cir. 2004) This Court must
20 presume correct any determination of a factual issue made by a state court unless the petitioner
21 rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

22 III. DISCUSSION

23 Culpepper contends that although his no contest plea to the Section 245(a)(2) violation
24 was knowing and voluntary, his no contest plea to the Section 12022.5 violation was not made
25 knowingly and voluntarily, because the "[r]ecord does not "AFFIRMATIVELY SHOW" that he
26 waived his rights with respect to the latter offense, as required by *Boykin*. Pet., p. 5 (Culpepper's
27 emphasis). Culpepper specifically asserts that: (1) the form he initialed and signed prior to
28 formally entering his plea did not specifically enumerate the Section 12022.5 enhancement; and

1 (2) “[the] Judge did not orally advise me of those rights, or ask if I gave them up.” *Id.*

2 On federal habeas, this Court reviews the decision of the highest state court to provide a
3 reasoned decision on the merits. *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir.
4 2000). Because the California Supreme Court summarily denied Culpepper’s petition for review,
5 the Court “looks through” the summary denial to the appellate decision. *Id.* Consequently, the
6 relevant decision for purposes of Culpepper’s appeal is the March 28, 2003 decision of the
7 California Court of Appeal denying Culpepper’s direct appeal.

8 The state appellate court found two facts in the record particularly relevant. First, it noted
9 that the trial court had specifically admonished Culpepper, “that he was settling ‘[his] case’
10 without a trial, which meant that he was ‘giving up some important legal rights’ that the court
11 proceeded to explain.” Second, it pointed out that both the prosecutor and the court orally
12 clarified that count one, to which Culpepper pled no contest, “included both the assault charge
13 and the enhancement.” App. Dec., p. 6 (emphasis added).

14 The state appellate court’s analysis that, applying the rule of *Boykin* to these facts, “the
15 [trial] court’s failure to again recite each of the *Boykin/Tahl* rights in accepting no contest pleas
16 to the offense and special allegation charged in count one” did not invalidate Culpepper’s plea to
17 the enhancement, was not unreasonable. In contrast to Culpepper’s claim that “[the] Judge did
18 not orally advise me of those rights, or ask if I gave them up,” the record shows that the trial
19 court *did* affirmatively advise him as to all of the rights he was waiving, and also explained the
20 effect of his waiver of rights with respect to the amount of time he could potentially serve for the
21 assault, for the “use” enhancement, and for the two combined.

22 The appellate court also quoted *People v. Howard*, 1 Cal.4th 1132, 1141 (1992), in noting
23 that, “under the federal Constitution . . . a plea is valid if the record affirmatively shows that it is
24 voluntary and intelligent under the totality of the circumstances.” *Id.*, pp. 5-6. See also *Rose v.*
25 *Lundy*, 455 U.S. 509, 526-27 (1982). Therefore, the appellate court soundly reasoned that, even
26 if error could be found in the trial court’s failure to enumerate separately each and every right
27 Culpepper was waiving for the enhancement component of count one, after having fully
28 enumerated those rights as to the underlying charge, “[such error] would certainly be harmless.”

1 *Id.*

2 Accordingly, Petitioner has failed to demonstrate that denial of his claim was contrary to,
3 or an unreasonable application of, clearly established federal law.

4 **IV. ORDER**

5 The petition for writ of habeas corpus is DENIED.

6
7
8
9
10 DATED: 4/3/06

11
12 
13 JEREMY FOGEL
14 United States District Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Copies of Order have been served upon the following persons:

Counsel for Petitioner:

Walter K. Pyle
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704

Counsel for Respondents:

Peggy S. Ruffra
Supervising Deputy Attorney General
Office of the Attorney General of the State of California
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102